BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
	)	CC Docket No. 96-98
Implementation of the	)	
Local Competition Provisions	)	
of the Telecommunications	)	
Act of 1996	)	

OPPOSITION OF THE UNITED STATES DEPARTMENT OF JUSTICE TO THE JOINT MOTION OF GTE CORPORATION AND THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY FOR A STAY PENDING JUDICIAL REVIEW

In the First Report and Order, the Commission adopted rules that will effectively implement the local competition provisions of Sections 251 and 252 of the landmark Telecommunications Act of 1996. The United States Department of Justice, one of the federal agencies responsible for enforcing the federal antitrust laws and promoting competition, has long been active in the telecommunications industry. The Department, which has a special role in proceedings under the 1996 Act, strongly supports the Commission's adoption of these procompetitive regulations.[1]

The Department opposes the motion of GTE and SNET, local exchange carriers that will face new competition as a result of the Act and the implementing rules, to stay the local

[1] See Comments of the United States Department of Justice (May 16, 1996); Reply Comments of the United States Department of Justice (May 30, 1996).

competition regulations pending judicial review. Movants fail to satisfy any, much less all, of the criteria for a stay.[2] Moreover, it is essential to the public interest in competition that the Commission and the courts reject all attempts to delay the local exchange competition that Congress intended the Act to promote and to disrupt the cooperation and coordination among the Commission, state authorities, the Department, and private parties on which the success of this complex undertaking depends.[3]

1. GTE and SNET's challenges to the Commission's local competition regulations are not likely, much less substantially likely, to succeed on the merits. Movants' basic contention is that the pricing standards and other requirements the FCC has adopted exceed its statutory authority. They have failed to substantiate this contention.

Contrary to GTE and SNET's contention, the inclusion of pricing standards in the FCC's regulations does not infringe on authority reserved to the states. As the Commission explained, the 1996 Act establishes a new regulatory system that differs significantly from that of the 1934 Act, which generally gave the FCC jurisdiction over interstate matters and the states jurisdiction over intrastate matters. In contrast, under the 1996 Act, many distinctions

---

[2]A party seeking a stay pending appeal must demonstrate: (1) that it is substantially likely to succeed on the merits of its suit, (2) that in the absence of an injunction, it would suffer irreparable harm for which there is no adequate legal remedy, (3) that the injunction would not substantially harm other parties, and (4) that the injunction would not significantly harm the public interest. See, e.g., Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958).

[3]Prompt disposition of all petitions for judicial review of these regulations would serve the public interest, and the United States, as statutory respondent in such proceedings, see 28 U.S.C. §§ 2341 et seq., will cooperate in proposing an appropriate briefing schedule to the reviewing court.

between interstate and intrastate services are eliminated as markets are opened to competition. Sections 251 and 252 of the 1996 Act create a system of parallel jurisdiction for the FCC and the states. The FCC is to establish implementing rules for interconnection, resale of services, access to unbundled network elements, and other matters, all on just reasonable and nondiscriminatory rates, terms and conditions. The states are to apply those rules in arbitrating and approving agreements between incumbent local exchange carriers and new entrants. See generally First Report and Order ¶¶83-103.

The Commission's order fully explains the bases for its conclusion that it has the statutory authority to adopt the regulations at issue, as well as its reasons for rejecting the more limited constructions movants and other commenters advocated. See id. The Commission's construction of the Communications Act of 1934, as amended by the 1996 Act, is fully supported by the statutory language, and by the legislative history and underlying policy of the 1996 Act. In this rulemaking, therefore, the FCC's reasonable interpretation of its governing statute is entitled to deference; the reviewing court must uphold the agency's construction even if it is not the only permissible interpretation. Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843 & n.11 (1984).

Movants' contention that the FCC erred in adopting the forward-looking Total Element Long-Run Incremental Cost ("TELRIC") standard and that it was required to provide for recovery of all historical costs also is meritless. The FCC has discretion in ratemaking matters and carriers have no constitutional right to recovery of full historical costs. See, e.g.,

Duquesne Light Co. v. Barasch, 488 U.S. 299 (1989).[4] The TELRIC cost methodology is not unjust or unreasonable, and any challenges to particular application of this standard are premature.[5] Moreover, as the Commission correctly concluded, TELRIC prices, which are based on future rather than past costs, will best foster competitive market incentives and thus are essential to effective implementation of the 1996 Act.[6]

2. The balance of private interests does not warrant a stay. The local competition rules will have an immediate impact on on-going negotiations, preventing incumbents from dictating the terms on which new entrants may use or interconnect with incumbents' services and facilities. But GTE and SNET's claim that this constitutes the kind of irreparable harm that could support a stay is flawed in several respects. Movants do not attempt to quantify the injury they predict or to explain why agreements and orders could not be structured to permit appropriate adjustments in the unlikely event the rules were vacated in whole or in part on appeal. Moreover, GTE and SNET may fear potential losses of customers and monopoly rents as a result of the fundamental industry changes the Act will promote, but they are not entitled to a stay that would protect them from effective development of local competition.[7]

On the other side of the private interests balance, stay of the local competition rules

---

[4]See Reply Comments of the United States Department of Justice (May 30, 1996) 13-21.

[5]See id. at 18-23.

[6]See id. at 4-13.

[7]While GTE seeks to delay local competition, it is already free to compete in interexchange as well as local markets. Under Section 601 of the 1996 Act, the antitrust consent decree that had prohibited GTE's local operating companies, the GTOCs, from providing interexchange services ceased to have any prospective effect as of February 8, 1996.

pending appeal would chill the negotiation process and thereby cause irreparable harm to new entrants currently seeking interconnection agreements. As the FCC correctly observed, absent clear legal obligations to enter into agreements that will open their markets to competition, and consequences for failure to satisfy such obligations, incumbent LECs would have incentives to frustrate, rather than to facilitate, competitive entry. A stay of the FCC's local competition rules also would make proceedings before state regulators more complex and uncertain. In short, if the rules are stayed entry will be much more difficult, expensive, time-consuming, and risky for firms seeking to compete with incumbent LECs.

3. The primary concern of the Department and the Commission is not the private interests of incumbent LECs or new entrants but the public interest in competition. That critical public interest consideration weighs conclusively against a stay. The 1996 Act rests on the Congressional determination that competition in local telecommunications will serve the public interest. Now that the FCC's regulations implementing the Act's local competition provisions are in effect, they will provide essential guidance for the private negotiations and state proceedings that are preconditions to local competition. If the regulations were stayed, however, the essential incentives that the Act provides for incumbent LECs to enter into procompetitive agreements would be seriously weakened, state commissions would be burdened with even more requests for arbitration, and agencies and reviewing courts would have no clear and uniform standards to apply in resolving those disputes.

Moreover, time is of the essence in the new regulatory scheme. The Act expressly mandates strict, interrelated time limits for various proceedings that will pave the way for effective local exchange competition. In particular, Congress required the FCC to promulgate

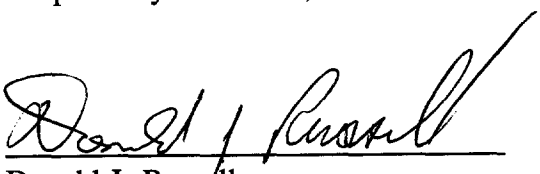
the regulations necessary to implement the local competition provisions of the 1996 Act within six months of enactment. With the cooperation of the states and other commenters, the Commission met that ambitious statutory deadline with a comprehensive and carefully tailored set of rules. The Commission cannot now stay its local competition rules as GTE and SNET ask. A stay would flout Congress' clear command, and the resulting delay would have a severe and lasting adverse impact on the public interest in implementation of the fundamental local competition policies and objectives of the 1996 Act.[8]

[8]The BOCs' compliance with these regulations is one precondition to their applications to provide in-region interLATA service. See 1996 Act, §271(C). Some of the BOCs have announced that they will seek judicial review of the rules, but no BOC has moved for a stay, and the Department does not know what position, if any, the BOCs will take before the Commission or the courts on the GTE-SNET stay motion.

CONCLUSION

The Commission should deny the motion for stay.[9]

Respectfully submitted,



Donald J. Russell
Chief
Telecommunications Task Force
Antitrust Division

Joel I. Klein
Acting Assistant Attorney General
Antitrust Division

David S. Turetsky
Deputy Assistant Attorney General
Antitrust Division

Nancy C. Garrison
Senior Appellate and Communications Counsel
Antitrust Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

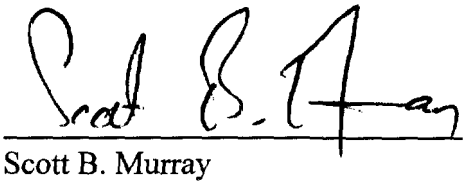
U.S. Department of Justice
555 4th Street, N.W.
Washington, D.C. 20001
(202) 514-5621

September 4, 1996

[9]Because GTE and SNET have not shown that any stay is warranted, it is unnecessary for the Commission to consider movant's alternative request for a stay limited to the regulations' pricing provisions.

Certificate of Service

I hereby certify that I am an Attorney for the United States in this proceeding, and have caused a true and accurate copy of the foregoing Opposition of the United States Department of Justice to the Joint Motion of GTE Corporation and the Southern New England Telephone Company for a Stay Pending Judicial Review to be served on all movants in this proceeding as indicated on the attached service list, by first class mail, on September 4, 1996.



Scott B. Murray
Attorney
Telecommunications Task Force
Antitrust Division
U.S. Department of Justice
(202) 514-9848